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Before the

Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
1998 Biennial Regulatory Review --)
Amendment of Parts 2, 25 and 68 of the)
Commission's Rules to Further Streamline)
the Equipment Authorization Process for)
Radio Frequency Equipment, Modify the)
Equipment Authorization Process for)
Telephone Terminal Equipment, Implement)
Mutual Recognition Agreements and Begin)
Implementation of the Global Mobile Personal)
Communications by Satellite (GMPCS))
Arrangements)

GEN Docket No. 98-68

Petition for Clarification

Motorola, Inc., pursuant to Section 1.429 of the Commission's Rules, respectfully asks the Commission to clarify that the provisions of Section 2.962(f)(4) of the regulations adopted in the *Report and Order*¹ to the confidentiality of information submitted by a telecommunications certification body (TCB) in response to a request from the Commission include protection for information that is treated by an applicant as confidential business information of a type that would be protected currently under Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d) (1997).

¹ Report and Order, FCC 98-338, _____ FCC Rcd _____ (Dec. 23, 1998). A summary of the Report and Order was published in the *Federal Register*, Feb. 2, 1999, 64 FR 4984.

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Background

The Commission's *Report and Order* marks the beginning of a new era in equipment authorization as the Commission and those it regulates embark on a course that will involve (1) the privatization of the equipment authorization program and (2) the implementation of mutual recognition agreements that will allow for approvals to be issued in the United States to open the door to foreign markets and vice versa. Motorola recognizes the challenge that this effort has presented and commends the Commission for undertaking this effort. When the new procedures become operational, the TCB approach should lead to markedly decreased processing times for equipment approvals. Such an improvement will facilitate product development and international trade.

The use of private entities to perform approval services that heretofore have been conducted by the Commission will, of necessity, require Commission oversight. As such, the Commission crafted the new rules to provide that TCBs must, upon request, file information with the Commission that had been provided to the TCB by its customers as part their equipment approval applications. The new regulations recognize that if such material includes "trade secrets" and is accompanied by a request for confidentiality, it will be withheld from routine public inspection.² As construed by the courts, the term *trade secret* goes to a process that a business does not disclose publicly.³

² Report and Order , ¶ 42.

³ See *Kewanee Oil Co. v. Bicron Corporation*, 416 U.S. 470, 474-75 (1974); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983); see also, James T. O'Reilly, *Federal Information Disclosure*, §§ 14.04, 14.06 (1998) for a discussion of the distinction between "trade secrets" and "confidential business information."

Motorola believes that in adopting Section 2.962(f)(4) of the new regulations, the Commission intended to accord applicants the same treatment that they would be entitled to under the general rules pertaining to the submittal of confidential information. Thus, Section 0.457 of the Commission's Rules governs the protection of confidential information submitted in connection with equipment authorization applications processed by the Commission. The new regulation, however, refers only to "trade secrets" as being entitled to protection from routine public disclosure. In contrast, the regulations pertaining to submittals generally are more inclusive and allow for the protection of confidential information that may not otherwise qualify as trade secrets. For example, the term "confidential information" as used in Section 0.457 of the Commission's Rules is broader in scope and covers documents that may not qualify as trade secrets, but which are held in confidence.

Proposed Clarification

In order that there be no doubt as to the scope of protection for information submitted by a TCB to the Commission in connection with the approval process, Motorola urges the Commission to revise Section 2.962(f)(4) to read as follows:

Where concerns arise, the TCB shall provide a copy of the application file within 30 calendar days upon request by the Commission to the TCB and the manufacturer. Where appropriate, the file should be accompanied by a request for confidentiality for any material that qualifies for confidential treatment under the Commission's Rules ~~as trade secrets~~. If the application file is not provided within 30 calendar days, a statement shall be provided to the Commission as to why it cannot be provided.

By revising the regulations in this manner, the Commission will clarify that no change in the scope of protection was intended. The requested change will also give manufacturers

greater confidence in the TCB process. As such, manufacturers will have an additional incentive to use the TCB process knowing that they need not give up the protection to which they are now entitled.

Respectfully submitted,
Motorola, Inc.

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March 4, 1999